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(2)

IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR.

Criminal Appeal No. 211 of 1992.

Appellant. BHIM BAHADUR son of Khamha Singh aged about 43 years, Constable No. 311 SAF 11th Battalion, Bhilai Tahsil and District Durg, Permanent address Dikhet post Pilekhar, Police station Amoli District Tanhu Nepal.

versus

Respondent : The State of Madhya pradesh.

1223

1-2-92 S.K. Chokhel

1.2.92

APPEAL UNDER SECTION 374 (2) OF THE CODE OF CRIMINAL PROCEDURE. (Against the judgment and findings of Shri B.P.Mishra, 3rd Additional Sessions Judge, Durg, passed in Session Trial No. 101/90 Dated 6th day of December 1991).

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मामला क्रमांक Cr.A.211/92 **सन् 200**

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

DIVISION BENCH: HON. SHRI L.C. BHADOO &
HON. SHRI DHIRENDRA MISHRA, JJ.

Criminal Appeal No. 211 of 1992

Appellant — **Bhim Bahadur**

Vs

Respondent — **State of M.P.**

Present:

Shri M.D. Dhote, counsel for the appellant.

Shri U.N.S. Deo, Additional Public Prosecutor with Shri M.P.S. Bhatia, P.L. for the State.

O R A L J U D G M E N T
(02/03/2007)

Per L.C. Bhadoo, J

By this appeal under Section 374(2) of the Code of Criminal Procedure the accused/appellant has questioned the legality and correctness of the judgment of conviction and order of sentence dated 06.12.91 passed by the 3rd Additional Sessions Judge, Durg in S.T. No. 101/90 whereby the learned 3rd Additional Sessions Judge after holding the accused/appellant guilty for commission of the offence under Section 302 of the Indian Penal Code, for committing the murder of his wife namely Buddhimaya, sentenced him to undergo imprisonment for life.

2. Case of the prosecution, in brief, is that Birendra Bahadur gave merg intimation Ex.P-4 on 15.08.89 at about 8.30 a.m. in the

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police station Mohan Nagar, Durg to the effect that he is working as Head Constable in 11th Betallion of S.A.F., Bhilai. He is living in Katulbod with his wife Bilmaya in the house of Patiram Baghel. In the adjoining room, since last 1½ month Bhim Bahadur, S.A.F. 311 is residing as a tenant along with his wife Budhimaya. A day before thereto of the incident, in the evening, at about 5.30 p.m. when he came to his house, at that time Bhim Bahadur was in his house. After sometime Bhim Bahadur went for evening stroll. At about 7.30 p.m. in the evening he left for SAF line for attending evening roll call. By that time accused/appellant Bhim Bahadur did not return. At about 10.00 p.m. in the night, when he returned from the Battalion Bhim Bahadur and his wife were talking slowly in their room. He recognized their voice. He took his dinner and thereafter at about 11.00 p.m. he went for sleep. In the morning when alarm clock started ringing he woke up and after observing morning course, he saw that door of the house of Bhim Bahadur was opened and light was on. As Bhim Bahadur used to wake up daily in the morning, he thought that today why he has not woke up, therefore, he went towards the house of Bhim Bahadur and shouted but there was no response, therefore, he asked his wife to go and find out what has happened. His wife went and shouted. Thereafter she entered the house and saw that hand of wife of Bhim Bahadur was out of the mosquito net and was pale. She returned and informed him. Thereafter he went to the house of Bhim Bahadur, saw that Bhim Bahadur was not on the cot

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whereas his wife was lying under the mosquito net, her tongue was protruding, a pink terricot saree was around her neck, she was already dead. He immediately took his bicycle and went to the SAF line, informed Havaldar Major Top Singh. Thereafter he along with Top Singh and Laksheshwari went to the house of Bhim Bahadur, saw the dead body of Budhimaya. He was asked to report the matter to the police. Receiving this report, SHO of police station Mohan Nagar registered Crime No. 332/89 for commission of the offence under Section 302 of the IPC, left for the scene of occurrence, after giving notice Ex.P-3, prepared inquest Ex.P-2 on the body of Budhimaya. The body of Budhimaya was sent for post mortem to Government Hospital, Durg under Ex.P-5 where Dr. K.K. Mishra and Dr. N.L. Jain conducted the post mortem, report Ex.P-12 was prepared. They opined that the cause of death was asphyxia due to strangulation.

3. After completion of investigation, charge sheet was filed in the Court of Judicial Magistrate First Class, Durg who in turn committed the case to the Sessions Judge, Durg from where the learned Additional Sessions Judge received the case on transfer for trial.

4. The prosecution in order to establish the crime against the accused/appellant examined 12 witnesses. Statement of the accused was recorded under Section 313 of the Cr.P.C. in which he denied the material appearing against him in the prosecution evidence and stated that in the fateful night he was not at his

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residence. He himself appeared before the police station. He has stated that on the fateful evening he left his house at 5.00 p.m., returned at about 12.00 midnight. When he opened the door of his house, he saw that his wife was lying dead, he became panicky and ran away. He has been falsely implicated in the crime.

5. Learned Additional Sessions Judge after hearing the respective parties convicted and sentenced the accused as aforementioned.

6. We have heard Mr. Dhote, counsel for the accused/appellant and Mr. M.P.S. Bhatia on behalf of the State.

7. In this case there is no ocular and direct evidence to establish the crime against accused/appellant. The conviction rests on the circumstantial evidence.

8. As per settled law in order to rest conviction based on the circumstantial evidence, as per the decision of the Apex Court in the matter of **Dhananjoy Chatterjee Vs. State of W.B.** reported in **(1994) 2 SCC 220,** the circumstantial evidence must satisfy the following tests:

a. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

b. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

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c. the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

d. the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

9. The prosecution has tried to establish the crime against the accused/appellant on the basis of following circumstances:-

i) Death of Budhimaya was homicidal.

ii) The accused/appellant and deceased were talking in their room in the fateful night.

iii) The accused was absconding from his house

iv) The accused gave false explanation regarding his abscondance from the house.

10. As far as first circumstance is concerned, P.W.-12 Dr. K.K. Mishra, who conducted the post mortem on the body of Budhimaya, has stated that on 15th of August 1989 he along with Dr. N.L. Jain conducted the postmortem on the body of Budhimaya, at that time, there was a cream brown colour saree tied around the neck of Budhimaya. Ligature mark and a contusion in the size of 3"x3" on the left side and behind the neck.

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On internal examination, skin,, muscles and blood vessels were congested. Other organs i.e. brain membrane, neck, wind pipe, both lungs and membrane of the intestine, liver, spleen were congested. Smell of the kerosene was emanating from Sari. In his opinion, death of the deceased was homicidal in nature, same was due to asphyxia as a result of strangulation. His report is Ex.P-12. P.W.-9 N.L. Jain has corroborated the above evidence and stated that he along with Dr. K.K. Mishra conducted the post mortem on the body of Budhimaya, their report is Ex.P-12. He concurred with the finding given by Dr. Mishra. In his opinion also the cause of death was asphyxia due to strangulation. In cross-examination of these two witnesses, defence has not been able to elicit any circumstance to show that the cause of death was not strangulation. In view of the above medical evidence, it is established that death of the deceased was homicidal in nature.

11. Mr. Dhote, counsel for the accused/ appellant argued that in this case the prosecution has not adduced any evidence regarding motive of the accused/ appellant for committing murder of his wife.

12. It is a settled law that in the cases of circumstantial evidence if motive is known, then same plays an important role in connecting the accused with the crime in question. If the motive is not known, even then based on the circumstantial evidence accused can be held guilty for the crime.

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13. The Apex Court in the matter of ***Mulk Raj Vs. Satish Kumar & Others*** reported in ***1992 Cr.L.J. 1529*** and in the case of ***Dinesh Lal Vs. State of Maharastra*** reported in ***1992 Cr.L.J. 1545*** held that in cases of circumstantial evidence motive bears important significance, but failure to discover the motive of an offence does not signify its non-existence. The failure to prove motive is not fatal as a matter of law. Proof of motive is never an indispensable for conviction.

14. In the present case, the prosecution has tried to establish the circumstance that in the fateful night accused/appellant and deceased were in their room, after committing murder of his wife, accused absconded from the room without informing anybody. In the morning dead body of Budhimaya was found in the room. In this connection P.W.-2 Birendra Bahadur has stated that Bhim Bahabur and Budhimaya used to reside in a room which was adjoining to their room, he was residing as a tenant and the house was of one Pati Ram. He has stated that on the fateful night, on 14th of August 1989 he heard the talks of accused/appellant and his wife who were talking slowly. He went for sleep. At about 4.00 a.m. on 15th of August 1989 he woke up and came out of his house to go for attending the call of nature. He saw that the door of the house of Bhim Bahadur was opened and light was on. Even when he returned after attending the call of nature, the door was still opened, light was on. He thought that Bhim Bahadur might have woke up early but nothing was audible from the house of Bhim

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Bahadur. He thought that Bhim Bahadur must have gone for his duty. When he came out of his quarter after getting himself ready, even then the door of the house of Bhim Bahadur was open and light was on, therefore, he suspected and went towards the room of accused along with his wife and saw that the wife of Bhim Bahadur was lying dead on the cot, her one hand was out of the mosquito net. Bhim Bahadur was not at his residence, therefore, he went inside the room, lifted the mosquito net and saw that the tongue of Budhimaya was protruding. There was cloth around her neck. Therefore, he immediately went to the Betallion Havaldar and informed him. Thereafter, they returned to the house of Bhim Bahadur. Laksheshwari Havaldar Major asked him to go and lodge the report in police station, therefore, he lodged report Ex.P-1.

15. In cross-examination, he has stated that in the night, he heard talks of Bhim Bahadur and his wife Budhimaya, they were just talking like husband and wife. P.W.-1 Dilmaya, wife of Birendra Bahadur has stated that Bhim Bahadur was serving in the S.A.F. Battalion, he was residing in the adjoining room. She went to the house of Bhim Bahadur on the fateful morning when her husband came out of the house and saw that the house of accused/appellant was open and light was on, therefore, her husband called Bhim Bahadur but there was no response. Thereafter her husband went into the house of Bhim Bahadur and saw the body of his wife. In the night, she had not heard the voice of the talk of Bhim Bahadur and his wife, but in the night of the

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incident Budhimaya and accused were in their house. In the cross examination she has stated that in the fateful night the accused/ appellant and his wife were in the house.

16. P.W.-5 Pati Ram, owner of the house, in para-5 of his cross-examination has stated that distance between the room of Bhim Bahadur and room of Birendra was about three feet. Therefore, it was possible for Birendra Bahadur to hear talks of Bhim Bahadur and his wife. This witness has not been cross- examined to ascertain the fact that talk of Bhim Bahadur and his wife was not audible from their room.

17. From the evidence of P.W.-2 Birendra Bahadur and P.W.-1 Dilmaya wife of Birendra Bahadur who were just neighbours of accused/ appellant, it is established that the accused/ appellant was at his residence in the night and both were talking when Birendra Bahadur returned from the Battalion at about 10.00 p.m. Learned counsel for the accused/ appellant argued that it was not possible for Birendra Bahadur to hear talks of the accused and his wife during the night, but we do not find any substance in this argument for the reason that in the first instance, Pati Ram, landlord has stated that it was possible for Birendra Bahadur to hear talks of Bhim Bahadur and his wife Budhimaya from their room. Moreover, Birendra Bahadur has categorically stated that he had heard their talks at night. He is an independent witness and nothing has been elicited in the cross-examination, which shows

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that this witness has any grudge or animosity against the accused/appellant.

18. In view of the evidence of P.W.-2 Birendra Bahadur, the explanation offered by accused/appellant in his statement under Section 313 of the Cr.P.C. that when he returned at about 12.00 midnight he saw the dead body of his wife, therefore, he became panicky and frightened and left the house, is false for the reason that in the first instance Birendra Bahadur has categorically stated that he heard the voice of the talks of accused/appellant and his wife at about 11.00 p.m. in the night and in the second place, had the accused returned at about 12.00 midnight and seen the dead body of his wife then in natural course he ought to have immediately apprised the neighbour about the incident and thereafter would have informed to police after consulting the neighbour. He being an employee of the S.A.F. was knowing the consequences of his abscondance and not informing the police or the neighbour, therefore, the explanation given by accused/appellant that he left the house being frightened is not correct. In the circumstances, it cannot be said that Birendra Bahadur is not a natural witness.

19. As far as question that the accused gave false explanation regarding his abscondance from the house is concerned, as per evidence of P.W.-1 Dilmaya, P.W.-2 Birendra Bahadur, P.W.-3 Laksheshwari Prasad and P.W.-4 Top Singh, accused/appellant was missing from his house. Accused himself has admitted in his

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statement under Section 313 of the Cr.P.C. that when he returned in the night he became frightened and panicky, therefore he left the house and did not report the matter. After more than 22 days of the incident he was arrested in the case, no explanation has been offered by the accused as to why he remained absconded for such a long period and did not report the matter when he saw his wife was lying dead in the room.

20. Learned counsel for accused/appellant placing reliance on the judgment of the Apex Court in the matter of **Matru alias Girish Chandra Vs. The State of U.P.** reported in **AIR 1971 SC 1050** argued that merely on the ground of abscondance the accused cannot be held guilty. In paragraph 15 of the said judgment, Apex Court has held that:-

> "The appellant's conduct in absconding was also relied upon. Now mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime: such is the instinct of self-preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case".

21. Therefore the fact of abscondance has to be considered along with other evidence in order to connect accused/appellant with the crime in question. In the instant case, as per the prosecution evidence, presence of the accused/appellant on the fateful night in

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his house is established, accused thereafter absconded for about more than 22 days, only after that he was arrested. The explanation offered by the accused/appellant that on the fateful night at about 12.00 mid night he returned and saw the dead body, being frightened, ran away has not been found plausible and correct, therefore, the circumstance of abscondance of the accused/appellant from his house is an additional ground for connecting the accused/appellant with the crime in question.

22. For the foregoing reasons, chain of the circumstances in this case is complete. If all the circumstantial evidence is taken together, then conclusive irresistible inference can safely be drawn that the accused/appellant was the author of the crime in question. There is no possibility of any third person coming in between for committing crime in question.

23. In the result, we do not find any substance in this appeal and the same is liable to be dismissed. It is accordingly dismissed.

Sd/-
L.C.BHADOO
Judge

Sd/-
DHIRENDRA MISHRA
Judge

Suguna

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